R. A. MIKELSON

IBLA 76-12 Decided July 6, 1976

Appeal from decision 9181 (420), Group 545, Montana, by the Director, Bureau of Land Management, dismissing protest against the acceptance of a plat of survey.

Affirmed.

1. Hearings -- Rules of Practice: Hearings

   The allowance of a request for a hearing before an Administrative Law Judge in a protest against a survey by the Bureau of Land Management is within the discretion of the Board of Land Appeals. There is no right to such a hearing.

2. Secretary of the Interior -- Surveys of Public Lands: Generally -- Surveys of Public Lands: Authority to Make

   The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States, and he has the authority to extend or correct the surveys of public lands as may be necessary, including the surveying of lands omitted from earlier surveys.

3. Public Lands: Generally -- Public Lands: Riparian Rights -- Surveys of Public Lands: Generally

   Title to an island omitted from the original survey but existing at that time in a non-navigable river remains in the United

States and is subject to survey despite the disappear-ance of the channel separating the island from the lots which were formerly riparian.

APPEARANCES: Gareld F. Krieg, Esq., Crowley, Kilbourne, Haughey, Hanson & Gallagher, Billings, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

R. A. Mikelson appeals from a decision of the Director, Bureau of Land Management (BLM), signed by the Chief, Division of Cadastral Survey, dated May 29, 1975, dismissing his protest against the acceptance of a plat representing a dependent resurvey of a portion of the south and west township boundaries and a portion of the township subdivisional lines, a survey of the subdivisional lines of section 31, and the survey of an island in sections 29, 31, and 32, T. 2 S., R. 20 E., P.M.M. His protest is directed primarily against the survey of the island. 1/

The protested survey was carried out by Harold Grusing, Supervisory Cadastral Surveyor, pursuant to special instructions for Group 545, Montana. On October 27, 1967, at the request of the District Manager, Billings District, supplemental instructions were issued which provided for the survey of an island in the Stillwater River, i.e., the land disputed in this appeal. Grusing conducted a dependent resurvey of the south and west boundaries and a portion of the subdivisional lines of the township along with a survey of the subdivisional lines in section 31 and the disputed island. The south boundary of the township was originally surveyed by Deputy Surveyor Daniel P. Mumbrue in 1889 under Contract No. 283, Montana, dated December 24, 1892. Portions of the west boundary and the subdivisional lines and meanders of the south bank of the Yellowstone River and both banks of the Stillwater River were originally surveyed by Deputy Surveyor Henry B. Davis in 1901 under Contract No. 385, Montana, dated March 18, 1901. The plat of the Davis survey was approved on December 1, 1902. In 1943, John Rudd was issued a patent for 304.88 acres in section 32, including all of the fractional lots along the right bank of the Stillwater River in section 32, being lots 1, 4, 5, 6 and 7, embracing 144.88 acres. The omitted land consists of 33.75 acres, 30.78 acres of which are in lots 8, 9, 10 section 32 and are not included in the 144.88 patented acres.

1/ A notice of appeal was filed by Richard H. and Mildred R. Pals, but no statement of reasons was timely filed with this Office, and their appeal is being dismissed for that reason by an order of this date. 43 CFR 4.402.

Appellant asserts ownership to land which includes fractional lots 1, 4, 5, 6 and 7 section 32, which lie along the right bank of the Stillwater River, according to the original plat. The omitted land lies between the meander line of these fractional lots and the main channel of the Stillwater River. 2/

The Bureau's decision found that although the disputed land was not shown on the original survey, it was an island at the time Montana was admitted to the Union and that title to the land never left the United States. Appellant contends that the omitted land was never separated from the surveyed riparian lots and that his property extends to the center of the main channel of the Stillwater River.

It is agreed that the disputed land is no longer completely separated from the land surveyed in 1901 by a presently flowing channel of the Stillwater River, but that fact does not settle the question of title. We must first consider whether the unsurveyed land was ever an island and, if so, when it existed as such.

There is no question that the disputed land is situated beyond the meander line of the right bank of the Stillwater River established by the 1901 survey. However, the plat of that survey shows no land at all beyond this meander line, and the field notes of that survey do not make any particular reference to the disputed land. Nevertheless, the October 26, 1967, report of the investigation offers persuasive evidence that the disputed land existed in 1901 and has existed for over a century. 3/ The 1967 report noted that rings on

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2/ Appellant's statement of reasons on appeal and his protest of July 11, 1974, suggest that there may be some misunderstanding about what BLM holds to be the exact boundary between the omitted land and the appellant's land. Appellant's protest conveys the impression that he understands that a slough separates the disputed lands from his holdings. The plat of Grusing's survey makes clear that it is not the slough but an abandoned channel defined by Davis' meander lines which separates the omitted land from the patented holdings. BLM holds that the boundary is the center of the former channel which still carries water from the point where it meets the slough and where the channel is joined by Shane Creek.

3/ The decision below found that the land was in existence at the date Montana entered the Union, November 5, 1889. While we accept that finding, we note that the existence of an island at the date of admission is not a necessary finding where a non-navigable stream is involved. The report of the investigation characterizes the Stillwater River as non-navigable.

a pine tree stump on the island indicated that the tree was from 90 to 110 years old when cut. A lifetime resident of the area who was about 75 years old at the time of the report stated that the island has been in its present position since 1900. Another witness reports that no changes have occurred since 1943. One Columbus, Montana, resident has indicated that since he arrived in Columbus in 1941, it was his understanding that the disputed land belonged to BLM. He stated that in 1946 or 1947, he contacted John Rudd, the original patentee, about leasing the disputed lands for a horse pasture, and that Rudd told him that the lands belonged to BLM.

[1] The appellant attacks the conclusion that the disputed land was an island separated from the mainland by a channel of the Stillwater River at the time of the 1901 survey, and he has requested a hearing before an Administrative Law Judge. The allowance of a request for a hearing to present evidence on an issue of fact is within the discretion of this Board. 43 CFR 4.415. We note that the appellant was invited to make a statement to the BLM in which he could have indicated the existence of evidence to support his assertion that the land omitted from the original survey had not been an island. However, his protest of July 11, 1974, contained arguments of law and allegations of fact unsupported by an offer of evidence of any kind. 4/ While it might appear as a first impression that there is an issue of fact arising from the appellant's efforts to refute the Bureau's factual findings, no such issue has been developed. The conditions which prevailed at the time of the original survey can only be determined on the basis of recorded survey data and presently observable geographic features. The available data appears to fully sustain the Bureau's finding that the land omitted from the 1901 survey, which is here in dispute, was separated from the land Davis surveyed by a channel of the Stillwater River and was thus an island.

There is no right to a formal hearing on a protest against a survey of omitted lands. However, if questions of fact are not wholly answered in the record, the Board, in its discretion, may refer the case to an Administrative Law Judge for a hearing. 43 CFR 4.415. See Utah Power & Light Company, 6 IBLA 79, 79 I.D. 397 (1972).

Other than 43 CFR 4.415 authorizing fact-finding hearings in the discretion of this Board, there is no provision in the regulations authorizing a hearing before an Administrative Law Judge on a protest against a survey. The purpose of a survey of omitted lands,

4/ Compare Stanley G. West, 14 IBLA 26 (1973), where the appellant had submitted affidavits in support of his assertions of avulsive change.

as will be discussed further, infra, is to enable this Department to take a position and determine whether certain land is public land subject to its jurisdiction and to ascertain the boundaries and subdivisions of such public land. Although a private land owner who protests a survey alleges his property rights are being affected in that the survey casts a cloud upon his own title, the ultimate question of title to a tract of land in dispute must be resolved in the courts. Such a question is excepted from the administrative hearing requirements of the Administrative Procedure Act, 5 U.S.C. § 554(a)(i) (1970). This is far different from the situation where a party is asserting a right to a patent of public land under a law entitling him to a patent and other possessory rights upon meeting certain statutory conditions. E.g., United States v. O'Leary, 63 I.D. 341 (1956). There the Department must determine if the statutory preconditions have been satisfied and there is only limited court review of that determina-tion, not a de novo determination by the courts. In any case, any due process right alleged to exist in the protestor is satisfied without an administrative hearing before an Administrative Law Judge by the opportu-nities the protestor has to submit documentary and other evidence to BLM and this Board, and in an ultimate court proceeding affecting the title to a disputed tract.

We believe that all questions raised by appellant's assertions are resolved by reference to the evidence developed by the investigation and by comparing the Grusing resurvey of the subdivisional lines and meander lines in section 32 with the original survey conducted by Davis in 1901. A hearing is not warranted or justified in these circumstances.

Davis' plat shows an abrupt spreading of the river at the point where the omitted island begins near the eastern boundary of section 31. At that point, the river's width suddenly increases from less than three chains to more than 11 chains. Although the plat does not show an island, the disputed island lies within the area where the river is shown as abruptly widening, and as noted above, the island existed when Davis made his survey. Grusing reported that the meander lines surveyed by Davis along the right bank of the river now follow a well-defined bank, thus providing topographic evidence that Davis had correctly meandered a continuous watercourse between the patented land and the omitted land.

The section lines between sections 29 and 32 and between sections 31 and 32 both traverse the river and the disputed land. These lines were originally surveyed by Davis and were resurveyed by Grusing. Comparison of the plats and field notes of both the survey and the resurvey demonstrates the accuracy of the Davis survey.

At a point 19.34 chains north of the corner of sections 5 and 6, T. 3 S., R. 20 E., P.M.M., and sections 31 and 32, T. 2 S., R. 20 E., Davis reached what he called the right bank of the Stillwater River, monumented the meander corner, and marked two pines as bearing trees. Grusing determined the meander corner from one of these original bearing trees and placed a new monument 19.34 chains north of the section corner. Davis triangulated the distance across the river as 11.35 chains and set a meander corner on the left bank of the river. He did not note the existence of any land between the meander corners. Beyond the meander corner that he remonumented, Grusing noted the existence of an abandoned channel of the Stillwater River 2.20 chains wide, and he set a witness point at the thread of this channel. At a point 6.07 chains north of the old meander corner, he established a meander corner for the present right bank of the main channel of the Stillwater River. At a point 11.45 chains north of the original meander corner on the abandoned channel, Grusing remonumented the meander corner for the left bank of the river.

Appellant's protest charges the survey has mistaken a slough for the abandoned channel of the Stillwater River. While the field notes of Grusing's resurvey referred to the slough located 9.20 chains north of the section corner as an abandoned channel, it is clear that this slough was not taken to define the boundary between the omitted land and the land originally surveyed by Davis. The boundary of the disputed land is the center of the channel having a meander corner of 19.34 chains north of the section corner. The fact that Davis set a meander corner at a point now delineated by a bank indicates that water did flow through what Grusing called an abandoned channel of the river.

The line separating sections 29 and 32 also crosses the river and the omitted land. Davis marked a meander corner for the right bank of the Stillwater River at a distance of 45.23 chains west of the section corner. He then set a meander corner on the left bank of the Stillwater River at a point 53.54 chains west of the section corner, indicating that the section line extends 8.31 chains across the river. Again, Davis did not mention the existence of any land between these meander corners.

Grusing set the meander corner for the right bank of the east channel of the river 45.04 chains west of the section corner. (The appellant contends that this east channel is really Shane Creek.) The meander corner for the left bank of the east channel was set at 46.81 chains west of the section corner. The meander corner for the right bank of the main channel of the river was set at 52.44 chains west of the section corner, and the true point for the meander corner of the left bank of the river falls in the river at 53.31 chains proportionate distance from the section corner. Grusing placed a witness meander corner on the present left bank of the Stillwater River 56.70 chains west of the

Section corner. This comparison indicates that Davis properly meandered the river, although he did not mention the existence of the island in the river. The field notes Davis made in meandering the right bank of the river provide perhaps the strongest evidence that the omitted land was an island which was separated from the patented lands by a channel of the river. The notes and plat also help to resolve the points raised by the appellant in his argument that the lands in question were never separated from the patented lands by a channel of the river.

Appellant contends that the watercourse that Grusing calls an east channel of the river is actually a slough along the southeastern side of the omitted land and that Shane Creek flows by the northeastern side of the omitted land. Appellant contends that the slough and the creek never connect. Shane Creek flows northwesterly until it reaches the point where it joins what Grusing's survey characterizes as the east channel of the river, where the water then changes course and flows in a northeasterly direction.

Grusing's plat shows the slough and abandoned channel to be separate entities which join in fractional lot 6 of section 32. Davis' plat and field notes indicate a slough entering the Stillwater River in fractional lot 6, at about the same place where Grusing indicated that the slough joins the abandoned channel. Grusing's plat shows Shane Creek joining the east channel in the corner of lot 5 at the same place where Davis' plat and field notes indicate that Shane Creek joins the river. As noted above, Davis' meander line for the right bank of the Stillwater River now follows a well-defined bank indicating that Davis correctly meandered a channel of the river. Appellant's contention that Grusing mistook the slough and the creek for the east channel of the river is clearly incorrect. The comparison of the plats and field notes establish that Grusing faithfully resurveyed the lines surveyed by Davis in 1901, and topographic evidence indicates that Davis correctly meandered the right bank of what at that time was the east channel of the Stillwater River. Although the land in dispute was not shown on the plat or indicated in the field notes of the 1901 survey, vegetation on the land and the statements of long-time residents of the area establish the existence of this land at the time of the survey and the evidence constrains us to conclude that this land was an island at the time of the 1901 survey.

[2] Appellant's protest asserts that the survey of the disputed land was improper because of the policy established by this Department that a survey of the United States, after acceptance, is presumed to be correct, and will not be disturbed, except upon clear proof by an applicant for a survey that the original survey is fraudulent or grossly erroneous. George S. Whitaker, 32 L.D. 329 (1903); State of Louisiana, 60 I.D. 129 (1948); Nina R. B. Levinson, 1 IBLA 252, 256, 78 I.D. 30, 33-34

(1971). This policy, however, does not prevent the Government from initiating surveys of what it determines to be public land. Cf. George S. Whitaker, supra; Whitaker v. McBride, 197 U.S. 510, 515-516 (1905). The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. This Department, acting for the United States, has the authority to extend or correct the surveys of the public lands as may be necessary, including the surveying of lands omitted from earlier surveys. Kirwan v. Murphy, 189 U.S. 35, 54 (1903); State of Oregon, 60 I.D. 314 (1949); Utah Power and Light Company, supra.

In a case arising from an official resurvey of the boundary of a patented Mexican land grant, for the purpose of defining the contiguous public land, Mr. Justice Holmes, speaking for the Supreme Court, said:

> But however that may be, the whole proceeding on behalf of the United States is simply an effort to fix the boundaries of its own land. It is recognized, it was recognized when the Perrin survey was set aside, that the United States has no authority to change the Hancock line; but it has a right for its own purposes to try to find out where that line runs and the fact that its conclusions may differ from that of the owners of the Hancock grant does not diminish that right. So long as the United States has not conveyed its land it is entitled to survey and resurvey what it owns and to establish and reestablish boundaries, as well one boundary as another, the only limit being that what it thus does for its own information cannot affect the rights of owners on the other side of the line already existing in theory of law. If, as the result of the survey adopted, the United States should give patents for land thought by the plaintiffs to belong to them, "the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court." Litchfield v. The Register, 9 Wall. 575, 578. Minnesota v. Lane, 247 U.S. 243, 250.

Lane v. Darlington, 249 U.S. 331, 333 (1919).

[3] The omission of an island from a survey does not divest the United States of the title to the island or interpose any obstacle to surveying it at a later time if the island existed at the date of the original survey (or at the date of a state's admission to the Union in the case of an island in a navigable river). This is because the island was not a part of the bed of the river but was land above the mean high water level and thus not subject to the riparian rights of the owners of the lands along the banks of the river. Scott v. Lattig, 227 U.S. 229 (1913). Title to such an island remains in the United States and the island remains subject to survey despite the disappearance of the channel separating the island from the lots which were formerly riparian. United States v. Severson, 447 F.2d 631 (7th Cir. 1971), cert. denied, 404 U.S. 1039 (1972).

In asserting his title over the disputed land to the main channel of the Stillwater River, appellant adverts to the familiar rule that a meander line is not run as the boundary of a tract, but to define the sinuosities of the banks of a river as a means of ascertaining the acreage in the fraction surveyed, except where there is fraud or gross error in the original survey or where facts and circumstances disclose an intention to limit a grant or conveyance to the actual traverse lines. Railroad Co. v. Schurmeir, 74 U.S. 272 (1868); Hardin v. Jordan, 140 U.S. 371 (1891); United States v. Lane, 260 U.S. 662 (1923); Lee Wilson & Co. v. United States, 245 U.S. 24 (1917); Producers Oil Co. v. Hanzen, 238 U.S. 325 (1915); Jeems Bayou Fishing & Hunting Club v. United States, 260 U.S. 561 (1923); Utah Power and Light Company, supra. However, the decisions in Scott v. Lattig, supra, and United States v. Severson, supra, do not permit the application of this rule to deprive the Government of title to an island or land which had been an island at the date of the original survey. See also Ritter v. Morton, 513 F.2d 942 (9th Cir. 1975), cert. denied, sub nom. Ritter v. Kleppe, 423 U.S. 947, 96 Sup. Ct. Rep. 362 (November 11, 1975). Moreover, we note that Grusing's survey recognizes that the boundary of appellant's land is not the 1901 meander line but is the center thread of the former channel of the river.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge

Martin Ritvo
Administrative Judge

Edward W. Stuebing
Administrative Judge

I concur in the result:

Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

I must dissent from the main opinion on the basis of my belief that appellant is entitled to a hearing. Mikelson has stated that he desires a hearing to present evidence on an issue of fact, viz., the non-existence of the "island" and the "old abandoned channel" referred to in the decision of May 29, 1975, rendered by the Chief of the Division of Cadastral Survey. Mikelson further requests that the case be referred to an Administrative Law Judge to hold such a hearing.

The main opinion states in applicable portion as follows:

> Any question raised by appellant's assertions are resolved by reference to the evidence developed by the investigation and by comparing the Grusing resurvey of the subdivisional lines and meander lines with the original survey conducted by Davis in 1901. A hearing is not warranted or justified in these circumstances.

Mikelson purchased the land from John F. Jensen, who, together with his predecessors in interest, assertedly has held the land for some 60 years. Mikelson claims record title interest in the land in issue.

The main opinion assumes that the allowance of a request for a hearing is always within the discretion of the Board -- to be granted or withheld at the whimsy of the Board.

The Department has recognized the need for hearings where a claim to property (viz. a mining claim) is sought by the Government to be declared invalid. United States v. Keith V. O'Leary, et al., 63 I.D. 341 (1956). I submit that a claim to property is at issue in the case at bar.

Even assuming, arguendo, that a claim to property is not involved, the courts have recognized that property rights need not be at issue in order to trigger the need for a hearing.

In Board of Regents v. Roth, 408 U.S. 564, 571 (1972), the Supreme Court stated that "the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."

In Goldberg v. Kelly, 397 U.S. 254 (1970), involving the termination of welfare benefits, the Supreme Court held that a pre-termination evidentiary hearing is necessary to provide the welfare recipient with procedural due process. The Court required the following ingredients:

1. timely and adequate notice;
2. confronting adverse witnesses;
3. oral presentation of arguments;
4. oral presentation of evidence;
5. cross-examination of adverse witnesses;
6. disclosure to the claimant to opposing evidence;
7. the right to retain an attorney;
8. a determination on the record of the hearing;
9. a statement of reasons for the determination and an indication of the evidence relied on;
10. an impartial decisionmaker.

The Court stated at 397 U.S. 262 as follows:

* * * The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" Shapiro v. Thompson, 394 U.S. 618, 627 n. 6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, Sherbert v. Verner, 374 U.S. 398 (1963); or to denial of a tax exemption, Speiser v. Randall, 357 U.S. 513 (1958); or to discharge from public employment, Slochower v. Board of Higher Education, 350 U.S. 551 (1956). 9/ The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961), "considera-tion of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also Hannah v. Larche, 363 U.S. 420, 440, 442 (1960).

> It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. 10/
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> The text of the footnotes in the material quoted above is as follows:
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> 9/ See also Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926) (right of a certified public accountant to practice before the Board of Tax Appeals); Hornsby v. Allen, 326 F. 2d 605 (C.A. 5th Cir. 1964) (right to obtain a retail liquor store license); Dixon v. Alabama State Board of Education, 294 F.2d 150 (C.A. 5th Cir.), cert. denied, 368 U.S. 930 (1961) (right to attend a public college).
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> 10/ One Court of Appeals has stated: "In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." R. A. Holman & Co. v. SEC, 112 U.S. App. D.C. 43, 47, 299 F.2d 127, 131, cert. denied, 370 U.S. 911 (1962) (suspension of exemption from stock registration requirement). See also, for example, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of food not fit for human use); Yakus v. United States, 321 U.S. 414 (1944) (adoption of wartime price regulations); Gonzalez v. Freeman, 118 U.S. App. D.C. 180, 334 F. 2d 570 (1964) (disqualification of a contractor to do business with the Government). * * *

There is no urgency present which impels the Government to void appellant's claimed title without affording him procedural due process.

The right to a hearing has also been recognized by the courts in Jennings v. Mahoney, 404 U.S. 25 (1971); Bell v. Burson, 402 U.S. 535 (1971) (both involving the revocation of motor vehicle licenses); Escalera v. New York City Housing Authority, 425 F.2d (2nd Cir. 1970); Holmes v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968); Williams v. White Plains Housing Authority, 62 Misc. 2d 613 (Sup. Ct. 1970), involving entrance to and expulsion from public housing; Dixon v. Alabama State Bd. of

Educ., 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1962), involving denial of student status; Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926), withdrawal of license to practice business; Greene v. McElroy, 360 U.S. 474 (1959); cf. Parker v. Lester, 112 F. Supp. 433, 443 (N.D. Cal. 1953), rev'd, 227 F.2d 708 (9th Cir. 1955), involving withdrawal of security clearances; Bridges v. Wixon, 326 U.S. 135 (1945); Ng Fung Ho v. White, 259 U.S. 276 (1922), involving deportation proceedings; and Vitarelli v. United States, 359 U.S. 535 (1959), involving dismissal from public employment.

Finally, in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the Court held that Natives in Alaska seeking allotments under the Native Allotment Act, 43 U.S.C. §§ 270-1-270-3 (1970), repealed by 43 U.S.C. § 1617 (Supp. III, 1973), who assert 5 consecutive years of occupancy, are entitled to a hearing.

Appellant in the case at bar is in a much stronger and more compelling position than the Alaska Natives. He has presumably paid substantial consideration for his acquisition of ostensible title to the land; he is not seeking a benefit from the Government, but simply the right to retain what he purchased.

I readily appreciate that the contrary argument may be made that the Government is only surveying its own lands and that his ostensible title to the land would not be revoked by the survey. The short answer is that appellant by reason of the survey no longer has a marketable title and the survey may be used as a basis to oust him from possession. That he could seek to have his rights adjudicated in a court of law, Poatbitty v. Skelly Oil Co., 390 U.S. 365 (1958), does not minimize the damage involved in denying appellant due process, his right to a hearing.

Frederick Fishman
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge